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The Role of Levies in Canada's Digital Music Marketplace

Jeremy F. deBeer[†]

Introduction

Music has been called a “canary in the digital coalmine”¹ because the fate of the music industry foreshadows that of the book publishing, movie, television, software and video game sector.² Each of these creative industries is concerned about sustainability in the face of change, although the music industry has been the most talked about lately. The technological, economic, cultural and social environment in which all music creators work is much different than it was even a short while ago. There is increasing pressure, therefore, to revise Canada's copyright laws to address numerous perceived problems.

One of the topics being discussed by courts, commentators and government policymakers is the role of levies, as opposed to traditional copyrights or other alternatives, as a solution to the challenges of the digital music marketplace.³ The Canadian music industry has traditionally built business models upon the exchange of proprietary copyrights in free markets, sometimes made more efficient through collective administration. Simultaneously, the industry has benefited from a variety of public funding programs designed to financially support specific parties or activities. Recently in Canada, new schemes have emerged or been proposed whereby the music industry collects remuneration from third parties not directly involved in the use of copyright-protected music.

One example is Canada's private copying levy, which obliges importers of certain blank media to pay remuneration to some music creators on account of music copied privately by individual Canadians. The levy currently applies only to blank audiotapes and compact discs (CDs). The Copyright Board of Canada also certified a levy on digital audio recorders, such as Apple's iPod, although this was overturned on appeal.⁴ It is possible that this levy will soon be expanded to encompass iPods and similar digital music devices, solid-state removable digital memory products like CompactFlash cards, hard disc drives in desktop and laptop computers, and/or mobile phones, personal digital assistants and

other convergence devices onto which music may be copied. The government is now studying the issue and has promised public consultations in the very near future.

Another example of a scheme targeting third parties rather than music consumers directly is “Tariff 22”, which had proposed to charge Internet Service Providers (ISPs) for royalties in respect of music hosted on or telecommunicated via their networks. After the Supreme Court of Canada ruled that ISPs are generally not liable to pay such a tariff,⁵ it was refiled to target Web sites rather than intermediaries. Nevertheless, some commentators in Canada and the United States have suggested that a levy on Internet access should be implemented as a substitute for traditional copyright laws in the online environment.⁶

This paper considers whether such initiatives are a desirable alternative to the current system of exclusive proprietary copyrights. My goal is not to evaluate the nuances of any particular levy scheme or proposal, but to consider the implications of the concept from a specifically Canadian perspective. Despite the generality of the analysis, many of the observations and conclusions about the viability of levy schemes relate to Canada's actual experiences with its existing private copying levy.

The paper concludes that tariffs or levies on the products and services of third parties are not the best method to support the Canadian music industry in the digital environment. A new levy should not be imposed on iPods, digital memory cards, computer hard drives, other digital devices, nor should there be a levy applied to Internet access. Indeed, Canada's existing private copying levy should be eliminated or substantially overhauled.

In the long term, the whole idea of exclusive copyrights will probably require some fundamental rethinking, and the shape of the music industry might be very different from the one we know now. Forward-thinking commentators who have advocated for revolutionary alternatives to the copyright system have there-

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fore made a valuable contribution to the debate about the future of digital music and entertainment.

In the near term, however, proposals for radical reform will likely lead to compromise solutions and half-measures, which are neither conceptually justifiable nor practically workable. It is preferable to tweak the existing system of proprietary copyrights and free markets by promoting and streamlining voluntary collective licensing models. These must be supplemented with stable and generous funding programs targeted directly at Canadian artists and music consumers.

Copyright Markets

To properly evaluate contemporary challenges, one must begin by acknowledging the complex structure of the music industry. The creation of music, like other cultural products, is a team sport.⁷ The process originates with lyricists and composers, the authors of musical works. Performers interpret authors' works through their performances. Producers ("sound recording makers"⁸) transform performers' performances of authors' works into mass-marketable commodities, like CDs or downloadable digital files. Music was typically distributed either through retailers or broadcasters. In today's marketplace, however, "weightless"⁹ products are being distributed through digital music stores, satellite transmissions, Webcasts, and various other means.¹⁰ The marketing chain used to end with music consumers, but that is also changing. Consumers themselves are often authors and performers, and they increasingly act as producers and distributors of original or re-mixed music as well. Any viable option for reform must therefore address the concerns of all parties, including consumers.

Traditional business models in the music industry depend on copyrights and related rights — exclusive legal rights to do certain acts in respect of music. These include most importantly the rights to reproduce and perform (or telecommunicate) music, and the right to authorize reproductions and performances (or telecommunications) of music.¹¹ Revenue streams are generated by voluntarily exchanging these rights for royalty or licence payments in free markets.

Copyright markets are, of course, artificially created. Music is not naturally rivalrous, excludable or exhaustible, meaning all Canadians can simultaneously sing the same song at the same time without doing the song itself any true harm. This is different from "classic"¹² private property, where one person's use precludes another's and there is a finite supply of goods available. In the music industry, copyright law creates artificial scarcity in order to drive market transactions.

Sometimes, the copyright market can fail. This might happen where the enforcement of exclusive rights is impractical because, for example, there are many potential licensees and the cost of licensing each out-

weighs the revenue that would be earned. The phenomenon of copying music for private non-commercial use was believed to be an example of such a situation. Enforcement is also difficult where the law is disconnected from the social norms that govern people's behaviour.¹³ It is tough to enforce laws that people do not believe in. Peer-to-peer file sharing is an example.

Sometimes, copyright enforcement is not impractical, but is otherwise objectionable. For example, there may be privacy or liberty concerns about monitoring private activities. This was apparently the impetus for world's first levy scheme, introduced in Germany in 1965.¹⁴ Such concerns were also debated in the recent case of *BMG v. Doe*,¹⁵ where the Federal Court of Appeal held:

Citizens legitimately worry about encroachment upon their privacy rights. The potential for unwarranted intrusion into individual personal lives is now unparalleled. In an era where people perform many tasks over the Internet, it is possible to learn where one works, resides or shops, his or her financial information, the publications one reads and subscribes to and even specific newspaper articles he or she has browsed. This intrusion not only puts individuals at great personal risk but also subjects their views and beliefs to untenable scrutiny.¹⁶

Ultimately, the Court's decision was to allow future copyright plaintiffs to obtain a court order, in certain circumstances, which would compel service providers to disclose their customers' identities. Both the trial and appellate decisions demonstrate, however, that courts do recognize privacy objections to copyright enforcement and monitoring tactics.

Another objection is that copyright markets are inefficient. Copyright law is structured to make it difficult for users of cultural products to bargain for the rights they need and want — for example, the ability to use "music", rather than a separate work, performance, recording and broadcast, and the separate rights to reproduce and to communicate those things. This fragmentation of copyright into various different rights held by different entities is a serious impediment to market exchange.¹⁷ In some cases, there are collective societies or licensing agencies that simplify the process by eliminating the need to negotiate with an individual party. However, there are an exceptionally large number of Canadian copyright collectives, and there is still inadequate co-operation amongst these representatives to facilitate the convenient acquisition of multiple rights from multiple entities.¹⁸

Copyright markets might also be objectionable where significant portions of copyright royalties flow to or through intermediaries. Because lyricists and composers often assign their rights to music publishers, and performers often assign their rights to record producers,¹⁹ these corporate intermediaries perform a gate-keeping function. Grant and Wood have noted an alarming trend in the market for cultural goods and services:

Five huge record companies control more than 70 per cent of dollar volume in sound recordings. . . . The concentration of media is growing apace around the world. It is harder and harder for "independent" producers to survive, whether in the United States or in any country where concentration is increasing. The distribution of cultural products is often in the hands of gatekeepers who reduce choice rather than expand it.²⁰

In theory, greater revenue for intermediaries means greater investment in product development, and so the benefit to grassroots artists is indirect but nevertheless real. This is true to an extent, but it is questionable policy to entrust responsibility for the development of Canadian music to foreign-controlled private entities. "What will happen is a more commercially oriented cultural sector offering fairly homogeneous fare for a mass audience and selected quality niches for a rich elite."²¹ A vibrant cultural industry furthers important non-economic values²² that may be neglected in a mass market controlled by global gatekeepers. This is especially true in respect of genuinely Canadian music.

The most recent statistical data (2003) confirms that foreign-controlled companies dominate the Canadian music scene with an 85% market share in sales of recorded music.²³ Professor Geist has commented in detail on Canada's "cultural deficit."²⁴ To be clear, the deficit Canada suffers is really in the exchange with the United States. In the year 2002 Canada's deficit in culture services trade with the United States stood at almost \$1.2 billion, while trade with the rest of the world amounted to a roughly \$250 million surplus.²⁵ A quick look at the significance of copyright royalty payments to Canada's cultural deficit with the United States may be a good indication of the effect of recent copyright reforms. Between 1996 and 2002, Canada's deficit with the United States in copyright royalty payments more than doubled.²⁶ At the same time, our deficit in trade-mark royalty payments increased by about one quarter.²⁷ If Canada further amends its copyright legislation to conform to international agreements, changes to the private copying levy alone could generate "a substantial increase in payments from Canadian consumers to foreign performers and makers" — further net outflows could be in the tens of millions of dollars.²⁸

In sum, the traditional business models built on the exchange of copyrights in a free market might be deficient in several ways. Arguably, exclusive copyrights are pragmatically difficult to monitor and enforce. Enforcement may also be objectionable for privacy reasons. Copyright markets might be inefficient, and can lead to a concentration of revenue and market power in the hands of foreign corporations at the expense of Canadian artists. In light of these concerns, it is not surprising that both copyright-holders and consumers sometimes advocate for levies as a solution, although each group does so for very different reasons.

Third Party Proxies

In cases where it is impractical, objectionable or inefficient to voluntarily exchange or enforce copyrights in the free market, some countries have introduced levies. Such levies vary greatly in scope²⁹ and theory.³⁰ In Canada, after more than a decade of lobbying, the music industry convinced Parliament that private copying onto blank tapes was causing significant losses.³¹ It seems to have been assumed that a levy was the best way to address this issue. So, in 1998, Part VIII of the *Copyright Act* legalized private copying onto some types of blank media, and as a corollary, allowed certain rights-holders to propose a levy payable by manufacturers and importers of those media.³²

The breadth of Canada's levy turns on the definition of an "audio recording medium" in section 79. It is legal to copy privately using "a recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose, excluding any prescribed kind of recording medium". Certain authors, performers and producers may propose a levy on the same.

After its first hearings on the matter, the Copyright Board adopted a flexible and relaxed interpretation of "ordinarily used" in order to ensure that blank CDs, a relatively new technology at the time, would be captured. It held the standard to mean that media are leviable so long as their use for copying music is "non-negligible".³³ In effect, according to the Board, ordinarily means not extraordinarily. The Federal Court of Appeal affirmed that this view was not "patently unreasonable" but stopped short of holding that the Board's interpretation was correct.³⁴

Another key phrase in section 79 is "regardless of its material form". Following its third hearings on private copying, the Copyright Board interpreted this to include digital audio recorders, such as the Apple iPod.³⁵ The Federal Court of Appeal, however, reversed the Board's decision on this point. The Court of Appeal held that memory is not a leviable medium if embedded into a device, and felt the decision to extend the levy to iPods was for the legislator, not the Board or the courts, to make.³⁶

One interpretation of the Court's decision leaves open the possibility that removable digital memory, or a computer hard drive that has not yet been incorporated into a device, could be subject to a levy in the future. It may, however, be splitting hairs to call an iPod a device and removable or raw digital memory a medium. More importantly, such a medium may not be in a form "ordinarily used" by individuals to copy music. In fact, the Copyright Board expressly held that products such as

IBM MicroDrive hard drives or CompactFlash digital memory cards are overwhelmingly used for digital photography rather than copying music.³⁷ Given the Board's lax interpretation of "ordinarily used" this could change in a heartbeat. On the other hand, the Federal Court of Appeal has indicated this issue is more a matter of legislative policy than statutory interpretation or the application of law to fact.

We may not have to wait for the courts to resolve the question. The Government has identified Canada's private copying regime as a timely issue, and has committed to engage in study and public consultations on the matter.³⁸ Among the most pressing questions will be whether, and if so how, the scheme should apply to digital devices, memory cards, computer hard drives and multi-use digital products in general.

Whereas the private copying levy might apply to digital devices in order to address the private reproduction of digital music by consumers, this is entirely separate from any royalties payable in respect of reproductions of author's musical works by "online music services" who supply consumers with digital music.³⁹ And, in addition to authors' rights, digital music suppliers must also worry about performers' and producers' reproduction rights. These must be cleared individually through various members of the Canadian Recording Industry Association (CRIA),⁴⁰ or possibly collectively through different bodies representing music in French and English.⁴¹ Believe it or not, this simplistic description of some reproduction rights-clearance issues in respect of authors, performers and producers only scratches the surface.

A whole other scheme is needed to deal with the telecommunication of digital music. Under the *Copyright Act*, these are distinct rights that are often held or administered by different entities. "Tariff 22", a proposal by the Society of Authors, Composers and Music Publishers of Canada (SOCAN) to collect royalties from anyone who communicates music to the public via the Internet, had the potential to become such a scheme.

Strictly speaking, Tariff 22 would have applied to everyone who communicated music online, including both Web sites and ISPs. However, by arguing that ISPs either telecommunicate as part of a chain of telecommunication, or authorize their customers to telecommunicate, SOCAN sought to collect copyright royalties at a convenient checkpoint.⁴² Practically, it is doubtful that SOCAN would have been able to collect royalties from the innumerable individual persons who communicate music via the Internet. In other words, because of a perceived inability to enforce copyright *vis-à-vis* individuals who transmit music via the Internet, Tariff 22 would have targeted third party proxies instead.⁴³ The underlying concept is strikingly similar to Canada's private copying levy.

When the Tariff 22 debate reached the Supreme Court of Canada in the case of *SOCAN v. CAIP*, the

Court confirmed the Copyright Board's ruling that ISPs are not typically liable for telecommunicating, or authorizing the communication of, copyright-protected content.⁴⁴ Proposed changes to the *Copyright Act* in Bill C-60 would require ISPs to pass notices of alleged infringement to their customers or face certain penalties. It would not, however, make ISPs liable for copyright infringement generally.⁴⁵ Therefore, SOCAN has amended its proposed tariff to target music Web sites, Webcasts and any other "site or service accessible via the Internet or a similar transmission facility from which content is transmitted to Users".⁴⁶

So far, no tariff would apply to intermediaries in their role strictly as intermediaries. But multiple proposed tariffs would apply to intermediaries that are in any way content providers. Moreover, the idea of a general levy on Internet access is by no means dead. Several commentators have proposed specifically that Canadian ISPs should be made legally responsible for providing remuneration in respect of other parties' Internet activities involving copyrighted cultural products.⁴⁷

The gist of the idea is to enact a regime similar to Part VIII of the *Copyright Act* to apply to Internet activities. Legislative amendments would permit unlimited non-commercial communications and reproductions. A correlative levy would be imposed on ISPs, who would presumably pass the costs to subscribers benefiting from proposed new copyright exceptions. The regime would apply to music, possibly also to movies and perhaps even to other cultural products.⁴⁸

The suggestion to adopt an exemption/levy model for Internet transmissions resembles grander schemes proposed by some American commentators. Professor Netanel, for example, delineates a comprehensive model that would permit private copying, remixes, adaptations, modifications, and dissemination of all kinds of communicative expressions in both digital and non-digital form.⁴⁹ To provide sufficient compensation to creators, a levy would be imposed on a broad range of goods and services the value of which is substantially enhanced by peer-to-peer file sharing. Professor Ku also advocates for levies on the sale of Internet services and electronic equipment, but his model would apply to digital cultural products only.⁵⁰ Professor Fisher proposes to allow various uses of audio and video recordings in exchange for a government reward system funded through taxation of digital recording and storage devices.⁵¹ Professor Lessig's model is similar, but he considers it to be useful only for a transitional period, until convenient music streaming via the Internet makes file sharing obsolete.⁵² Peter Eckersley, an Australian scholar, has similarly discussed the concept of a virtual market — a decentralized, software-mediated, publicly funded mechanism to reward digital authorship without restricting flows of information.⁵³

Although different in details, all of the aforementioned models are based on the same underlying idea —

dissemination of music and/or other pop culture should be encouraged and the present copyright system is a hindrance. Therefore, a new system is needed to generate financial incentives for creators. The solution is a variant of compulsory licensing. Typically, however, the licence fees are paid not by actual users but by third-party proxies, such as manufacturers of electronic hardware or software, or network providers and other intermediaries.

It is important to distinguish these proposals from ostensibly similar ideas discussed, for example, by Professor Gervais,⁵⁴ the Electronic Frontier Foundation (EFF),⁵⁵ and others.⁵⁶ Professor Litman notes that there are two models for collecting fees to be distributed among creators: a direct blanket licensing fee and levy or tax on the sale of goods or services.⁵⁷ Professor Gervais' model, for example, essentially proposes user fees, which are simply brokered by intermediaries and backed up by enforceable exclusivity. This type of scheme would be voluntary rather than compulsory.⁵⁸ Voluntary licensing proposals, unlike exemption/levy schemes, are built on a framework of exclusive proprietary copyrights. Professor Gervais advocates for a system whereby copyright is used to normatively coerce consumers into payment of licensing fees, but is in practice rarely or never actually litigated. Generally, Professors Gervais and Litman and the EFF propose to build new business models upon slight modifications to the existing paradigm.

Professor Merges has urged us to stick with the three "golden oldies" — property rights, contracts and markets.⁵⁹ Likewise, Professor Leibowitz has emphasized that we should not "throw out the baby with the bathwater" but should instead investigate more carefully arguments surrounding a shift away from an unfettered market.⁶⁰

In my opinion, copyright markets are far from perfect. Yet with some reorganization and streamlining, copyrights can work to facilitate a thriving digital music market in Canada. The market can give consumers who wish to pay for access to cultural products the ability to do so on clear and reasonable terms. Music can be sold online à la carte, through licensed peer-to-peer smorgasbords and from traditional bricks-and-mortar retailers. Despite the music industry's imprudent delays⁶¹ each of these business models is already proving to be a viable option built upon traditional proprietary copyrights.

The next step is to simplify market exchanges, rather than undermine them through an expanded exemption/levy scheme. It is not my purpose in this paper to elaborate on particular suggestions for reforming the existing system. Instead, the remainder of the discussion is aimed at supporting the proposition that a levy scheme is not the best way forward.

The relatively radical concept of substituting third party liabilities for free-market transactions suffers from numerous flaws. There are possible philosophical objections, constitutional constraints, international treaty

issues, cross-subsidization concerns and outdated assumptions, all of which must be dealt with before a broad exemption/levy scheme would be viable in Canada. On balance, the downside of levies outweighs any upside. In fact, all of the benefits that a levy would generate can be obtained more fairly and efficiently by other means.

Philosophical Objections

The philosophical justifications for granting copyrights to music creators fall into two broad categories.⁶² One view treats legal protection as a means to the end of greater creativity for the benefit of society generally. Under this utilitarian rationale, copyrights are necessary only to the extent they constitute an irreplaceable incentive to invest (effort or money) in the creation or dissemination of music. The other perspective perceives protection of creative work as a natural right simply formalized by legal recognition.

Distinctions within the music industry are highly relevant here. Authors and performers are living, breathing persons who can at least purport to have natural rights of ownership in their creative output. Whether or not their claim is convincing is debatable, but at least, *prima facie*, it is credible. The same is not true of producers and distributors, which, as unnatural legal entities, cannot claim they naturally deserve proprietary protection for their work. If they are to lobby for legal rights, the argument must rest on utilitarian grounds.⁶³

For those who believe that human authors or performers have natural property rights in their work, an exemption/levy model might seem difficult to accept. On this view, it might be unacceptable for the state to expropriate artists' innate property rights by introducing a mandatory licensing scheme. Professor Christie has explained that:

A statutory licence and levy scheme may appear antithetical to a copyright system in which the authors' rights are paramount. . . . Put simply, a statutory licence and levy removes a degree of control from the author. Such a scheme effectively declares that a licence will be imposed, for which compensation is received by means of a levy, irrespective of authorial consent. This appears contrary to one's stereotype of the principles underpinning European copyright law [that copyright is a natural entitlement of the author].⁶⁴

Indeed, evidence shows that the Canadian music industry was eager to obtain the levy, but reluctant to accept the concomitant exemption.⁶⁵

Christie has offered a possible explanation for the emergence of exemption/levy schemes in copyright systems that view authors' rights as natural. Essentially, levies represent a compromise solution that balances authors' rights to control their works with users' rights to privacy.⁶⁶ It has also been suggested that where a right to remuneration is provided for, there exists no basis for authorial control.⁶⁷ It is as if acknowledgment of the obligation to remunerate satisfies the need for recogni-

tion of authorship. This account of the legitimacy of private copying levies has potential, but further study is necessary to understand whether an expanded levy system would be philosophically consistent with Canada's pluralistic copyright framework.

There is a more fundamental point, however: to the extent that the philosophical underpinnings of Canadian copyright law permit us to re-evaluate the current system, we should abandon completely the idea of *ex post* compensation based on consumer demand — that is what markets do, and what markets do best.⁶⁸ When discussing levies as alternatives to markets, the compensation label is misleading. Levy payments have nothing to do with the use of any particular work, but reflect the expropriation of all copyrights-holders' ability to control use on a macro level. From a policy perspective, levy revenues are meant to offset the cumulative effect of exempting a class of users from liability for infringement. This should be contrasted with compensatory payments on account of individual uses. Viewed properly, levies are a form of subsidization, not compensation. Once this is recognized and accepted, then there is no reason that the economic incentives to create cultural products must come after the product has been created. The compensation label is, therefore, also unnecessary because the purpose of the exercise would be to generate *ex ante* "inducements", not *ex post* "compensation".⁶⁹ Levies are essentially a philosophical halfway point between a market based on proprietary rights and a system of direct or indirect public funding. Conceptually, this is very awkward.

Constitutional Constraints

The Canadian Constitution limits Parliament's ability to enact any sort of cultural policy it wishes under the auspices of the *Copyright Act*. I have dealt with this issue in detail elsewhere.⁷⁰ Briefly put, the problem is as follows. Parliament may enact laws in respect of "Copyrights", but the provinces control "Property and Civil Rights". Of course, by following proper procedures, Parliament can also impose laws about "Taxation". But Parliament cannot just tax Internet access or personal computers, and by calling it "copyright" make it so, at least not for constitutional purposes. This problem may not be insurmountable in the United States, where the Supreme Court seems to have given Congress considerable leeway to promote science and useful arts.⁷¹ But Australia's exemption/levy scheme was struck down as unconstitutional.⁷² In Canada, levies are vulnerable to attack on similar grounds.

The Federal Court of Appeal has recently affirmed the constitutionality of Canada's private copying levy.⁷³ However, the Court dealt with the "Copyrights" issue only briefly, and seems to have ignored evidence of the levy's legal and practical effects. When one fully considers the broad legal and practical effects that flow from the Board's interpretation of "ordinarily used" as estab-

lishing only a nominal threshold for imposing a levy on blank media, the levy begins to look, in pith and substance, a lot like an unconstitutional regulation of "Property and Civil Rights".⁷⁴

Furthermore, in respect of the "Taxation" issue, the Court suggested that the principle of federalism in Canada and the existence of a prohibition on intergovernmental taxation in Canada's Constitution were reasons to distinguish Australian case law.⁷⁵ However, the technicalities of intergovernmental taxes are not relevant to the determination of whether the levy is a "tax" or a "regulatory charge",⁷⁶ and regardless, the Australian Constitution is remarkably similar to ours in this respect, indicating that perhaps the Court wrongly distinguished the High Court's decision.⁷⁷

Therefore, it is quite possible that a provincial appellate court or a differently constituted panel of the Federal Court of Appeal would conclude that Canada's existing private copying levy is unconstitutional. Until the Supreme Court expresses an opinion on the matter, doubts will remain. It is certainly not safe to assume that an even broader levy would be constitutionally valid. The constitutional problems inherent in a levy on all digital memory cards, personal computers or Internet access may be insurmountable.

International Treaty Issues

An expanded exemption/levy scheme may also violate Canada's international treaty obligations.⁷⁸ For starters, any copyright exception must pass a three-step test: it must be restricted to special cases, not conflict with normal exploitation of the work, and must not unreasonably prejudice the legitimate interests of the rights-holder. A standalone exemption to cover some types of private copying, without a concomitant levy, is apparently acceptable. Time or format shifting under the American doctrine of fair use is separate and apart from that country's compensation scheme for digital audio home recording.⁷⁹ By contrast, the European Community's Copyright Directive states that private copying exemptions are only permitted on condition that rights-holders receive fair compensation, which would presumably require the introduction of a levy.⁸⁰ Some might argue that a levy is necessary whenever the cumulative effect of an exception is significant from a commercial standpoint.⁸¹ Yet this would seem to suggest that there should be a levy for pretty much any exception, which clearly there is not.

The more pertinent issue, however, is whether attaching a levy to a broad exemption would successfully repel a challenge based on the Berne/TRIPs three-step test. Commentators are generally cautiously optimistic that a levy scheme could be drafted to pass this test.⁸² Eckersley, while arguing that it remains possible, illustrates the wider trepidation: "It is improbable that an

alternative compensation camel could be squeezed through the Article 13 eye of the TRIPs needle.”⁸³

Further complications regarding a broad exemption/levy scheme in Canada arise in the context of looming treaty obligations. As things now stand, one of the primary advantages of the existing Canadian private copying levy is that it disproportionately benefits Canadian, as opposed to foreign, creators. Consistent with Canada's obligations under Berne/TRIPs, the existing levy scheme compensates both Canadian and foreign authors of musical works. Foreign authors get “national treatment” — they are treated no differently than Canadian authors. The same is not true for foreign performers and producers. Only Canadian performers and producers are entitled to a share of the revenues collected under Canada's current levy scheme. Perhaps our favouritism will eventually backfire by undermining the system of reciprocity at the heart of international copyright law, but for the time being Canadian performers and producers are disproportionate beneficiaries of our lopsided levy. From Canadians' perspective, this is a good thing.

But Canada is a signatory to the WIPO Performances and Phonograms Treaty (WPPT). Ratification (or possibly even “implementation”) of this treaty might have a serious impact on the distribution of levy revenues.⁸⁴ The WPPT requires national treatment for performers and producers. Were Canada to live up to these obligations, it would significantly increase the number of creators entitled to a share of levy revenues. This means a smaller piece of the pie for Canadian creators, or a bigger pie funded by Canadian consumers. Either way, Canadians lose. As mentioned, net outflows could add up to tens of millions of dollars.⁸⁵

The Standing Committee on Copyright Reform asserted in its May 2004 Report that “the private copying regime does not prevent Canada's ratification of the WPPT.”⁸⁶ Strictly speaking that might be true, but questions about Canada's ability to ratify this treaty are distinct from the distributional issues that may arise following ratification. Most recently, the March 2005 Government Statement on Proposals for Copyright Reform reopened the question of the current system's validity under the WPPT.⁸⁷

Cross-Subsidization

Exemption/levy schemes entail the drawback of cross-subsidization. This is a problem in two ways. First, the higher the number and more variable the type of rights-holders who become entitled to remuneration, the more difficult it is to distribute levy revenues on a just and timely basis. Indeed, simply determining what constitutes a just basis for distribution is problematic. Revenue generated on account of certain works ends up subsidizing other works, because it is impossible to precisely correlate the collection and distribution of funds to deserving (on whatever basis) rights-holders.

Substantial delays are unavoidable. In fact, a majority of the revenues generated under Canada's private copying regime have not been distributed. The first step of disbursing funds to the collectives representing particular classes of rights-holders has been drawn-out, and it is unclear whether any funds have ultimately reached real Canadian artists yet.⁸⁸ The Copyright Board has recognized that these delays are not the fault of the umbrella collective responsible for administering the levies.⁸⁹ They are instead an inherent problem with levies generally. Unfortunately, specific data on this matter may never emerge, as the Copyright Board has little ability to monitor or supervise the distribution of the levies.⁹⁰

Most proposals espouse a detailed tracking system of one sort or another to address the issue of revenue distribution. Such systems may be feasible in the long term, but uniform implementation will require tremendous co-ordination and commitment. Moreover, detailed tracking systems may undermine any privacy gains made by substituting exclusive copyrights with an exemption/levy scheme.

A second, more problematic, type of cross-subsidization is external. Exemption/levy schemes put the onus on innovative technology and communications enterprises to subsidize the music industry. One might argue this is justified on three possible grounds — causation, enrichment or convenience. However, it is much too simplistic to suggest that suppliers of blank media or Internet connectivity, for example, cause private copying. The argument that third parties are profiting directly or indirectly from private copying is also not a sufficient reason to impose a levy on their goods or services. Nor is simple convenience.

Causation, enrichment and convenience have never been organizing principles in copyright law. As Professors Lemley and Reese have recently put it: “Unrestricted liability for anyone who is in any way involved with such copyright infringement is a bad idea.”⁹¹ Nevertheless, American and Australian lawmakers have begun to impose copyright liability for secondary, tertiary or quaternary infringement.⁹² Canada has, thus far, resisted such pressures. An expanded exemption/levy scheme targeting third party proxies would represent a dramatic shift in Canadian law and policy.

Indeed, imposing a burden on third party providers of goods or services for such reasons would run contrary to fundamental principles established in the context of contributory liability, such as *MGM v. Grokster*⁹³ and *Sony-Betamax*⁹⁴ in the United States, and *CCH Canadian Limited v. Law Society of Upper Canada*⁹⁵ in Canada. The latest word from the United States Supreme Court is that contributory liability may be attributed to “one who distributes a device with the object of promoting its use to infringe copyright, as

shown by clear expression or other affirmative steps taken to foster infringement ...".⁹⁶ The rule "premises liability on purposeful, culpable expression and conduct".⁹⁷ Very few, if any, third parties whose goods or services would be levied under the typical exemption/levy proposals could be characterized in this way.

The Federal Court of Australia recently decided that the promoters of the Kazaa peer-to-peer file sharing system were legally responsible for authorizing copyright infringements.⁹⁸ But the Chief Justice of Canada, writing for a unanimous Supreme Court, explicitly rejected the principles of Australian law upon which that decision was based: "The [Australian] approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole."⁹⁹

Simply providing the means to facilitate, or benefiting from copyright infringement is not itself objectionable in Canada. Even if a blank media manufacturer or ISP could be said to authorize the copying or communication of music, courts must presume they do so only so far as it is in accordance with the law.¹⁰⁰ To be held liable based on conventional principles of Canadian copyright law, the alleged authorizer must have a degree of control over the actions of actual copyright infringers.¹⁰¹ Because providers of would-be levied goods and services usually do not control the actions of their customers, an obligation to remit payments to copyright holders on account of their customers' use of music runs contrary to the basic tenets of Canadian copyright law and policy.

It might be suggested that third party targets of levies actually benefit from the existence of exemption/levy schemes. The argument that legalizing private copying increases sales of copying hardware and software is difficult to refute or verify.¹⁰² It assumes first that legalizing an activity will make it more prevalent. Peer-to-peer activities, however, may be influenced more by social than legal norms.¹⁰³ Second, it assumes that music copying and blank media are complementary, so that if the cost of copying music (in terms of legal risk and/or social stigma) declines, demand for blank media will rise. This is probably true, but more information is needed to determine whether this increase will be sufficient to offset the decreased demand attributable to higher prices. If demand were inelastic, an exemption/levy might have little effect.¹⁰⁴ But one cannot generalize about the range of products that might be levied. Furthermore, even if there were some financial benefit to these third parties, levies entail a substantial administrative burden. Technology and communications firms are simply not in the business of collecting, accounting for and remitting levies, nor should they be.

The net effect of levies on providers of levied goods and services is unlikely to be positive. Most people take for granted that costs are eventually passed on to end consumers. But again, that assumption is difficult to

verify. And if costs were in fact passed on to consumers, the net financial effect would again depend on the price elasticity of demand for levied products. Higher prices for blank media, iPods, personal computers or Internet access may result in lower demand, ultimately causing a loss of revenues. Levies can also result in significant market distortions by encouraging grey or black markets for levied products. This is a serious and real concern for all parties affected by Canada's existing private copying levy.¹⁰⁵

Fundamentally, the argument that the burden of levies is probably passed from providers of goods and services to consumers does not resolve the issue of cross-subsidization. The higher up the chain one goes, the less accurate the charge becomes. In respect of the private copying levy, the Federal Court of Appeal has acknowledged that: "Such a scheme cannot be perfect; it is a rough estimate, involving possible overcharging of some and undercharging of others."¹⁰⁶ Although some users of the product or service in question — blank media, personal computers or Internet access — will engage in the copying or communication activities at the root of the scheme, a great number of others will not.

Take the following concrete example. All blank CDs manufactured in or imported to Canada are subject to a levy to compensate for the fact that some blank CDs are used for copying music. The Copyright Board found that "between 80 per cent and 90 per cent of individual consumers who buy blank CDs do so in some measure for the specific purpose of copying pre-recorded music. Moreover, it appears that over 40 per cent of individuals use recordable CDs for no other purpose". However, the highest estimates suggest that of all blank CDs bought in Canada, the proportion of blank CDs used by consumers to copy music (as compared to those used by businesses, or for copying data or photographs, for example) is roughly one third.¹⁰⁷ The levy rate is discounted to reflect this fact, but the point remains that purchasers of two thirds of all blank CDs subsidize the few consumers who use these media heavily for copying music. Simply put, the levy has a much larger effect on persons who do not engage in private copying than on persons who do.

The over-breadth of Canada's private copying levy is more than just an unfortunate side effect for technophiles. It is a very serious issue for thousands of Canadian manufacturers, retailers and commercial purchasers of goods and services that are or would be levied. For example, imagine the effect that a levy on Internet access would have on e-commerce or educational uses of the Web. If the Government were to extend the levy to digital memory generally, without amending the meaning of "ordinarily" as interpreted by the Board, the same problem might arise in respect of memory cards, personal computers, mobile telephones, personal digital assistants or a range of other digital devices. Remember, the iPod is also a personal agenda, portable data storage device, digital photo album, and now even a mobile

phone and video player. There is no way to distinguish customers who fill these devices with music from those who do other things. As technological advances lead to increasing product convergence, this problem will only be exacerbated.

Moreover, consumers of these media may pay for the same activity two or even three times over. For example, someone who purchases a song from Apple's iTunes Music Store contractually acquires the right to make certain private copies of the track. They are expressly entitled to "burn and export" tracks "for personal, non-commercial use".¹⁰⁸ Yet this consumer would pay again for the same activity through the private copying levy on blank CDs. Furthermore, there is a possibility this consumer could still be sued for copyright infringement if, for example, the burning process involved making a copy on a personal computer.

Double-dipping in this manner is likely to cause resentment amongst consumers. This may ultimately jeopardize the viability of the levy scheme. Worse, consumer hostility toward industry tactics could actually undermine the implementation of creative new business models.

Unfairness might be alleviated through carefully tailored exceptions, which can in theory turn levies from blunt instruments into precise tools. However, separating the wheat from the chaff is not easy. If Canada's current private copying regime is any indication, things do not bode well for a potential levy on digital memory or Internet access. The Federal Court of Appeal, affirming the Copyright Board of Canada on this point, recently noted that Part VIII of the *Copyright Act* contains no legitimate exemptions for the vast numbers of consumers and, more importantly, businesses, who purchase blank media for purposes other than private copying.¹⁰⁹ The Court agreed with the Board's insights that there are fundamental problems with the *ad hoc* waiver program that has developed, because it is administered unilaterally by the beneficiaries of the levy.¹¹⁰ At a minimum, therefore, the Board ought to be given express jurisdiction to monitor an exemption scheme as part of any would-be broader levy.

Insofar as a levy is necessary or desirable, a more precise alternative might be to impose the charge at the source, not the destination, of copies of cultural products. This suggestion is not entirely without precedent. For example, the French film industry is supported in part by a levy on cinema tickets.¹¹¹ In the context of music, one option is to levy pre-recorded CDs and paid downloads, from which all copies ultimately originate.

Some might argue that, in fact, private copying is already factored into the price of music at the point of sale. Certainly, this is explicitly acknowledged with authorized downloads that include the right to make copies. It is also implicitly the case with copy-protected CDs that allow consumers to make copies in some ways but not others.

In principle, a levy on pre-recorded music might focus the burden of levies more precisely on the activities that justify their existence. First, the groups intended to benefit could collect the levies directly. Administrative, opportunity and other transaction costs that are currently imposed on manufacturers, importers, distributors and retailers of levied products could be reduced or eliminated. Second, it would insulate non-copiers from any effect of the levies. The burdens would fall instead only on those who consume music. By building the value of private copying into the source of music, a levy on CDs and downloads could be calculated to account for all spin-off copies that might eventually be made from that original source. Although there could be free trade issues to work around, such a levy might even be structured so as to favour Canadian creators over foreigners by reducing or eliminating the levy payable on sales of Canadian music.

One may argue that a levy on pre-recorded music would exacerbate rather than ameliorate the problems faced by authorized music distributors. The primary objection would be that increasing the price of music by adding a levy might drive even more consumers to obtain music from unauthorized sources. Yet, blank media manufacturers and importers could easily cite similar fears in respect of the market for their products. It seems unfair that technology and communications firms should bear a burden that the music industry itself would be unwilling to accept. Even if a levy on pre-recorded music is not ultimately a viable alternative, merely raising the idea forces us to consider why a levy on third-party proxy goods and services would be more acceptable. When all of the cross-subsidization issues are illuminated, this question becomes difficult or impossible to answer.

Outdated Assumptions

From Copyright Holders' Perspective

Perhaps the most basic reason not to adopt a broader exemption/levy scheme in Canada is that the need has never been convincingly demonstrated. And even if there was such a need in the past, fundamental legal and technological changes have occurred that call into question the primary rationale for levies — that proprietary copyrights are practically unenforceable. The assumptions that were thought to underlie Canada's existing private copying regime are no longer applicable.

On one hand, technological measures (commonly called TPMs) give creators an unprecedented ability to control consumers' use of digital music. All music sold online, and many new CD releases contain copy-protection measures. Such measures may dictate, for example, how many copies consumers can make or which sorts of devices can be copied to. One of the most thorough studies on this issue to date has concluded that levies

should be phased out as these tools become available to control private copying activities.¹¹²

It is true that no technology is entirely unassailable, but in fact, technological measures are typically criticized for being too effective. Most commentators who have looked at this issue have confirmed that Canadians need protection from these technologies, although some disagree.¹¹³ Because technological measures can help to create viable new business models for the music industry, such measures should probably not be prohibited outright. Some form of regulation, however, is warranted to safeguard consumers' rights and protect Canadians' privacy.

Recent lawsuits around the globe provide further evidence that exemption/levy schemes are unwarranted. Although it is impossible to sue every alleged infringer, it is unnecessary to do so. Laws are most effective when operating in the background, influencing social norms and facilitating the voluntary exchange of rights and obligations. As Professor Gervais points out, the recording industry's problem with peer-to-peer networks is not the impracticability of licensing the activity but the difficulty of influencing social norms surrounding this technology.¹¹⁴ Of course, lawsuits are not the first-best solution to the industry's woes. But the concern is more about public relations than logistics.

It should be noted that the Copyright Board and the Government have implicitly recognized that technological and legal developments have undermined conventional assumptions about private copying, and subtly indicated an intention to phase out Canada's existing private copying levy.¹¹⁵

The formula adopted by the Board for setting the levy rate contains a calculation recognizing that technological measures allow some consumers to pay directly for private copying rights.¹¹⁶ As this practice becomes more widespread, the Board may be willing to reduce levy rates accordingly, perhaps eventually approaching zero. To be clear, however, there is no guarantee that this will happen.

If Bill C-60 becomes law, it would not allow the circumvention of technological measures for the purpose of private copying, although circumventing for other non-infringing purposes would be permitted.¹¹⁷ This reservation — that one cannot circumvent to copy for private use — is somewhat mysterious. It prohibits consumers from making private copies, even though they have paid for the right to do so through the levy. In effect, this would allow the music industry to be remunerated for copies that individuals cannot make. The only possible explanation is that the government is depending on the Copyright Board to factor this into consideration when setting the levy rate. If that is the case, the Government would be wise to say so. The European Community's Copyright Directive expressly references the need for levies to take "account of the application or non-application of technological mea-

asures".¹¹⁸ Note, however, that a general discount in the levy rate would avoid supplying a windfall to music creators, but would do nothing to address the cross-subsidization concerns discussed above.

In general it seems as if the Government, through Bill C-60, has created a hierarchy whereby protection for technological measures is more important than the conceptual or practical integrity of the private copying scheme. In doing so, it has apparently expressed a preference for technological measures over private copying levies as a solution to some of the problems of the digital music market. But the ambiguity in respect of the Canadian Government's intention highlights the urgent need for study and comprehensive legislative reform in this area. Unfortunately, the Government has decided to evaluate these two fundamentally related matters separately, prematurely dealing with technological measures and/or unduly delaying private copying issues. Provisions addressing technological measures in Bill C-60 should not be adopted into law until this issue is sorted out, or at least until the Government is clear about its intentions.

In sum, by choosing to embrace technological protection measures and sue music consumers, the industry may have precluded itself from arguing that levies are a necessary response to the impossibility or impracticality of enforcing its copyrights.

From Copyright Users' Perspective

For many consumers who are proponents of exemption/levy schemes, the attractiveness lies mainly in the exemption aspect of the *quid pro quo*. Some have an ideological hostility toward copyright generally. Others might simply be concerned about the potential for abuse inherent in statutory monopolies, privacy issues, market efficiency or the siphoning of copyright royalties to foreign corporations. It is tempting to conclude that an exemption/levy model is capable of addressing such concerns, while at the same time recognizing the value of music and supporting the Canadian industry. On a closer look, however, it would seem that an exemption that covers the normal activities of most digital music consumers is either (a) unnecessary, or (b) unrealistic.

From the consumer's perspective, the assumption that a specific exemption/levy for private copying and other non-commercial activities is necessary may be outdated. Time or format shifting, archiving backups and personalizing compilations are all possibly examples of "fair use" in the United States.¹¹⁹ In Australia, on the other hand, it seems that these activities are not permitted despite the fact that everybody is doing it.¹²⁰ This has led one copyright expert to remark: "Australian law is an ass."¹²¹ The House of Lords would apparently agree:

From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year. Some home copiers may break the law in ignorance, despite extensive publicity and

warning notices on records, tapes and films. Some home copiers may break the law because they estimate that the chances of detection are non-existent. Some home copiers may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly — lavish expenses, extravagant earnings and exorbitant profits — and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying, the beat of Sergeant Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful than law-abiding instincts or twinges of conscience. A law which is treated with such contempt should be amended or repealed.¹²²

In Australia, a review is underway to determine what to do about the issue.¹²³

It is not clear whether Canadian law needs fixing to solve this particular problem. A decade ago, when Canada's private copying levy was introduced, courts and legislators seemed convinced that copyright was an instrument for the benefit of creators alone. The weight of opinion at that time was that distinctions between the American concept of "fair use" and the Canadian law of "fair dealing" meant private copying was clearly illegal in Canada.

Recently, however, the Supreme Court has issued a series of landmark decisions, all of which emphatically endorsed the notion of balance in copyright law.¹²⁴ A credible argument can now be made that many private non-commercial uses of music are "fair dealing" in Canada. This would render the private copying exemption in section 80 of the *Copyright Act* redundant in some cases,¹²⁵ and call into question the value of a broader exemption/levy scheme for consumers.

The Supreme Court of Canada unanimously agreed that systematic for-profit legal research carried out by tens of thousands of Ontario lawyers is fair dealing.¹²⁶ An individual's downloading activities for the purpose of consumer research, to evaluate a potential music purchase for example, would seem far less objectionable than that. Given the speculative nature of the fair dealing defence generally, the argument is difficult to apply prospectively *en masse*, but could certainly succeed in a *bona fide* case with a proper factual and evidentiary basis. This might require, for example, an affidavit as to the consumer's copying habits and intentions, or reference to some of the empirical data suggesting a positive correlation, if any, between downloading and music sales.¹²⁷

The Supreme Court also sanctioned the Great Library's telecommunication of works to persons who are fair dealing as an integral part of the research process.¹²⁸ Although an analogy to posting music on the Internet is inexact, the implications of the Supreme Court's ruling for more limited types of uploading has yet to be explored.

It is also unclear how "private study" might be interpreted following the Supreme Court's ruling. It would make sense for a court to put heavy emphasis on the adjective "private" and adopt "a large and liberal inter-

pretation"¹²⁹ of "study" — one that does not overlap with "research". A plain language interpretation of "study" might, therefore, include copying to watch or listen to (i.e., study) copyrighted content in private as fair dealing. This could conceivably cover time or format shifting, especially in light of the factors outlined by the Supreme Court for determining what is "fair".¹³⁰ The basic point is that the *CCH v. LSUC* decision seriously challenges conventional assumptions about the need for, and value of, exemptions offered to consumers in exchange for third party levies.

Regardless, aside from a possible fair dealing argument, the potential upside for consumers under an exemption/levy scheme is more apparent than real. The reason, in short, is that it is politically, economically and legislatively unrealistic to obtain all of the exemptions necessary to share digital music online.

For example, the private copying exemption in section 80 applies to a narrow genre of truly private copying onto certain types of media. Consumers wishing to exercise their putative rights may be caught infringing copyright for a number of incidental activities. As mentioned, a consumer who burns a song to a blank CD using a personal computer may well have made multiple permanent or ephemeral reproductions onto a personal computer — as things now stand, a device that is not an "audio recording medium".¹³¹ Even if expanded to cover iPods and personal computers, the private copying levy could conceivably apply to music downloading, but uploading is another matter. Uploading implicates telecommunication rights, which are typically owned and administered by distinct entities. It may implicate distribution or other rights as well, which would add another layer of nearly insurmountable complexity. A right to download would soon be fairly useless without a corresponding right for others to upload. And even supposing that an exemption/levy scheme of this sort were feasible, it would still apply only to uploading and downloading of music. Those consumers wishing to share or privately copy other products, such as movies, books or software, would be required to clear all necessary rights in the traditional manner.

For an exemption/levy scheme to succeed, fundamental and wholesale changes in the existing copyright system would be necessary. It is a mistake, therefore, for consumers to believe that a levy is a realistic trade-off for anything more than a narrowly tailored exemption for a limited class of activities, which may already be permitted. Exemption/levy proposals tend to divert attention from the more moderate possibilities. For user-rights advocates who would like to see meaningful changes in their lifetimes, efforts would be better spent promoting a shift from a categorical list of acceptable activities to an open-ended and principled right of fair dealing,¹³² coupled with proposals for streamlined voluntary collective licensing models. Prospects for success on that front are

much greater than arguing for a comprehensive exemption/levy scheme to satisfy consumers' needs.

To sum up, various assumptions about the need for levies are outdated. From copyrights-holders' perspective, the music industry has clearly demonstrated that there are both technological and legal means to create functional business models to address online uses of digital music. From consumers' perspective, an exemption to address the types of activities typically engaged in is either unnecessary or unrealistic.

Other Alternatives to Copyrights

Levies spread the burden of funding the music industry amongst technology and communications firms and their customers rather than the public at large. But recall the classic utilitarian argument in favour of copyright, that copyrights encourage the production of cultural products like music for the good of society as a whole. If it is true that society as a whole reaps the benefit of a healthy and vibrant Canadian music industry, it would seem fair that society as a whole, not just a particular economic or sector or group of consumers, contribute to such a goal.

Grant and Wood describe a "toolkit" that governments can use to support popular culture, including funding for public broadcasting, scheduling or expenditure requirements for private broadcasters, subsidies or tax incentives, foreign-ownership rules and competition policy measures.¹³³ The Canada Music Fund, for example, assists the Canadian music industry through various initiatives supporting songwriting, composing, new musical works, specialized music, market development, sound recording entrepreneurship and the preservation of Canadian music collections. Canada's music industry can be encouraged through increased education and training in the music sector, or by formal or informal recognition and awards for artists.

Also, public funding programs need not focus exclusively on the creation of cultural products, but should actively support dissemination as well.¹³⁴ In other words, emphasis should be placed on supply-side and demand-side cultural subsidies. Consumers should be encouraged to choose Canadian music, and be rewarded for doing so.

Funding public support programs for cultural industries is sometimes difficult and controversial.¹³⁵ One

problem is establishing selection criteria, such as potential or past performance, subjective merit or some other measure. Also there is the risk that public funding programs can constrain freedom of expression and lead to state control over culture. But, as long as one is not advocating a centrally planned welfare scheme for artists and cultural entrepreneurs, where the Department of Canadian Heritage becomes our cultural soup kitchen, such concerns are largely illusory.¹³⁶

Empirical evidence shows that public funding in regional cultural industries pays off, by encouraging a thriving cultural community, and in terms of spin-off economic activities.¹³⁷ Data also shows that public funding programs are inherently more efficient than a levy scheme when it comes to generating and distributing revenue to cultural creators. The average expense/revenue ratio for the Canada Music Fund is about 11%.¹³⁸ The Canadian Private Copying Collective (CPCC), an umbrella organization responsible for administering Canada's private copying levy, most recently reported a ratio of 15%.¹³⁹ I am not suggesting that the whole system of collectively administered copyrights could or should be replaced by the Canada Music Fund. But the numbers demonstrate that levies are a relatively inefficient method of supporting Canadian music. Government programs can and should complement a streamlined system of collective administration.

Conclusion

Exemption/levy schemes are conceptually and practically awkward, may be beyond the constitutional legislative competence of the federal government, and may violate Canada's international treaty obligations. There is no principled reason to impose the burden of levies on third parties in the technology and communications industries. Such shotgun approaches, which splatter liability around with the hope that some of the intended targets will be hit, may cause unacceptable collateral damage in the war on putative piracy. Contrary to traditional assumptions, exemption/levy schemes are unnecessary given current technological, legal and market conditions in Canada. Where necessary and appropriate, traditional market mechanisms can be supplemented by public funding programs targeted at specific artists or activities in the music industry.

Notes:

¹ Committee on Intellectual Property Rights in the Emerging Information Infrastructure, National Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* (National Academies Press, 2004) c. 2, online: http://www.nap.edu/html/digital_dilemma/.

² "High" culture products and services, like paintings, sculptures, photographs and the performing arts, for example, are not generally the topic of this paper.

³ See generally Peter K. Yu, "P2P and the Future of Private Copying" (2005) 76 U. Colo. L. Rev. 653; Cathy Alison, "The Challenges and Opportunities of Online Music: Technology Measures, Business Models, Stakeholder Impact and Emerging Trends" (Ottawa: Department of Canadian Heritage, 2004) [Alison]; Peter Eckersley, "Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?" (2004) 18 Harvard J. L. & Tech. 85 [Eckersley]; Daniel J. Gervais "The Price of Social Norms: Towards a

- Liability Regime for File-Sharing" (2004) 12:1 J. of Intellectual Prop. L. 39 [Gervais]; William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (San Francisco: Stanford University Press, 2004) [Fisher]; S.J. Liebowitz, "Alternative Copyright Systems: The Problems with a Compulsory Licence" (2004) IPCentral Review [Liebowitz]; Jessica Litman, "Sharing & Stealing" (2004), 27 Hastings Comm/Ent LJ 1 [Litman]; Robert P. Merges, "Compulsory Licensing vs. the Three 'Golden Oldies': Property, Contract Rights and Markets" (2004) Policy Analysis No. 508, CATO Institute, online: <http://www.cato.org/pubs/pas/pa508.pdf> [Merges]; Kimberlee Weatherall, "A Comment on the Copyright Exemptions Review and Private Copying" (2004) Melbourne Law School Legal Studies Research Paper No. 135 [Weatherall]; P.B. Hugenholtz, L.M.C.R. Guibault & S.M. van Geffen, *The Future of Levies in a Digital Environment* (2003) Institute for Information Law, online: <http://www.ivir.nl/publications/other/DRM&levies-report.pdf> [Hugenholtz]; Neil Netanel, "Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing" (2003) 17 Harv. J. L. & Tech. 1 [Netanel]; Raymond Ku, "The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology" (2002) 69 U. Chi. L. Rev. 263 [Ku]; Glynn S. Lunney, Jr., "The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act" 87 Va. L. Rev. 813 (2001) [Lunney]; and John Davidson, "Rethinking Private Copying in the Digital Age: An Analysis of the Canadian Approach to Music" (LL.M. Thesis, University of Toronto Faculty of Law, 2001) [unpublished] [Davidson].
- ⁴ *Private Copying 2003-2004* (Dec. 12, 2003) (Copyright Board of Canada), online: <http://www.cb-cda.gc.ca/decisions/c12122003-b.pdf>, rev'd *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, [2004] FCA 424 [CPCC v. CSMA].
- ⁵ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 [SOCAN v. CAIP].
- ⁶ See part 3, *infra*.
- ⁷ Peter S. Grant & Chris Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver: Douglas & McIntyre Ltd., 2004) at 27 [Grant & Wood].
- ⁸ See *Copyright Act*, R.S.C. 1985, c. C-42 at section 2 (definition of "maker").
- ⁹ Rick Van der Ploeg, "In Art We Trust" *De Economist (Leiden)* 150:4 (October 2002) at 333 [Van der Ploeg].
- ¹⁰ For convenience, this paper refers to "music" as shorthand for sound recordings and/or weightless transmissions of performances of musical works.
- ¹¹ See *Copyright Act*, *supra* note 8, sections. 3, 15, 18 and 21.
- ¹² "Classic" property refers to rights in respect of physical, tangible or corporeal things: see Jeremy F. deBeer, "Reconciling Property Rights in Plants" (2005) 8:1 J. World Intellectual Property 5.
- ¹³ Gervais, *supra* note 3.
- ¹⁴ K. Gaita & A.F. Christie, "Principle or Compromise?: Understanding the original thinking behind statutory licence and levy schemes for private copying" (2004) Intellectual Property Research Institute of Australia Working Paper No. 04/04 [Gaita & Christie].
- ¹⁵ *BMG Canada Inc. v. John Doe*, [2004] 3 F.C. 241, 2004 F.C. 488, aff'd (2005) 252 D.L.R. (4th) 342, 2005 F.C.A. 193.
- ¹⁶ *Ibid.* at para. 4.
- ¹⁷ Rights-holders tend to favour fragmentation, in order to protect control over numerous and independent revenue streams. See, for example, "The Digital Rights Bundle: Real Progress for Songwriters and Publishers?" (December 11, 2004) Billboard Magazine.
- ¹⁸ See Daniel J. Gervais and Alana Maurushat, "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management" (2003) 2(1) C.J.L.T. 15 at 18–20.
- ¹⁹ See David L.P. Garson *et al.*, *Musicians and the Law in Canada: A Guide to the Law, Contracts, and Practice in the Canadian Music Business* 3d ed. by Paul Sanderson (Scarborough: Carswell, 2000).
- ²⁰ Grant & Wood, *supra* note 7 at 1. Note that recent corporate mergers have consolidated the "five huge record companies" into four.
- ²¹ Van der Ploeg, *supra* note 9.
- ²² Van der Ploeg, *ibid.* mentions "aesthetic, decorative, spiritual, social, identity, historical, symbolic and authenticity values, as distinct from economic values such as use, exchange, store, status, option and bequest values."
- ²³ Statistics Canada, "Sound Recording", 26 October 2005, online: <http://www.statcan.ca/Daily/English/051026/d051026a.htm>.
- ²⁴ Michael Geist "Why Canada should follow U.K., not U.S., on copyright" *Toronto Star* (4 Oct. 2004); M. Geist "Advancing Technology Threatens Cultural Policy" *Toronto Star* (8 Nov. 2004): "For every dollar earned by Canadian sound recording artists in foreign markets, Canadians send \$5 out of the country to compensate foreign artists; Canadians import nearly three times the number of books as they export (as measured in dollars); and the Canadian broadcast industry generates only \$33.8 million in foreign markets while Canadians spend more than \$500 million on foreign broadcasting."
- ²⁵ The precise figures are \$1,181,610,000 and \$262,907,000. In 2002 total Canadian imports of cultural services exceeded exports by \$ 918,703,000. In that amount, copyright royalties and related services accounted for 360,548,000. See Statistics Canada: Culture Trade Survey 1996–2002; Culture services trade: Data tables, September 2004, catalog no. 87-213-XWE, online: <http://www.statcan.ca/english/freepub/87-213-XIE/87-213-XIE.xls>.
- ²⁶ From \$160,563,000 to \$365,471,000.
- ²⁷ From \$372,986,000 to \$490,418,000.
- ²⁸ Michael Rushton, "Economic Impact of Canadian WIPO Ratification on Private Copying Regime" (Ottawa: Department of Canadian Heritage, 2002) [Rushton].
- ²⁹ A.F. Christie, "Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches" (2004) Occasional Paper No. 2/04, Intellectual Property Research Institute of Australia, at 3–7, online: <http://www.law.unimelb.edu.au/ipria/publications/workingpapers/Occasional%20paper%202.04.pdf> [Christie].
- ³⁰ A.F. Christie, "Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches" (2004) Occasional Paper No. 2/04, Intellectual Property Research Institute of Australia, at 3–7, online: <http://www.law.unimelb.edu.au/ipria/publications/workingpapers/Occasional%20paper%202.04.pdf> [Christie].
- ³¹ According to then Minister of Canadian Heritage, Sheila Copps, a majority of the 44 million blank tapes sold in Canada in 1994 were used to copy music: see Transcript of Meeting on the Standing Committee on Canadian Heritage (3 October 1996): http://www.parl.gc.ca/committees/352/heri/evidence/21_96-10-03/heri21_bkl101.html. See also Task Force on the Future of the Canadian Music Industry, <http://www.pch.gc.ca/progs/ac-ca/progs/pades-srdp/pubs/f-sum-e.htm>; and Government of Canada, Parliamentary Sub-committee on the Revision of Copyright, "Charter of Rights for Creators" (1985).
- ³² Bill C-32, now *An Act to Amend the Copyright Act*, S.C. 1997, c. 24, sections. 50, 53; *Order Fixing the Dates of the Coming into Force of Certain Sections of the (Copyright) Act*, P.C. 1998-365, C. Gaz. 1998. II 1149. See generally CPCC v. CSMA, *supra* note 4; *Private Copying 1999-2000*, (Copyright Board of Canada) online: <http://www.cb-cda.gc.ca/decisions/c17121999-b.pdf>; *Private Copying 2001-2002*, (Copyright Board of Canada) online: <http://www.cb-cda.gc.ca/decisions/c22012001reasons-b.pdf>; *Private Copying 2003-2004*, *supra* note 4.
- ³³ *Private Copying 1999-2000*, *ibid.* at 41.
- ³⁴ *AVS Technologies Inc. v. Canadian Mechanical Reproduction Rights Agency* (2000), 7 C.P.R. (4th) 68 (F.C.A.) [AVS Technologies].
- ³⁵ *Private Copying 2003-2004*, *supra* note 4 at 38.
- ³⁶ CPCC v. CSMA, *supra* note 4 at paras. 153–164.
- ³⁷ *Private Copying 2003-2004*, *supra* note 4 at 42–43.
- ³⁸ Government of Canada, "Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act", online: <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html>; Government of Canada, "Government Statement on Proposals for Copyright Reform", online: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm.
- ³⁹ A tariff to cover these entities' reproduction activities has been proposed by CMRRA/SODRAC, the collectives representing authors' reproduction rights.
- ⁴⁰ Or the Canadian Independent Record Production Association (CIRPA).
- ⁴¹ See Copyright Board of Canada, "Copyright Collective Societies", online: <http://www.cb-cda.gc.ca/societies/index-e.html>.
- ⁴² Jeremy F. deBeer, "Canadian Copyright Law in Cyberspace" (2000) 63:2 Sask. L.R. 503 at 524–29.
- ⁴³ Note that SOCAN only represents the interests of authors, not performers and producers. The same activity — telecommunicating music via the Internet — would also require royalty payments to collectives

- representing performers and producers. Such payments would likely be made through the Neighbouring Rights Collective of Canada (NRCC). No tariff has yet been proposed that would cover performers' and producers' digital communication rights, perhaps because CRIA members would prefer to license these activities on an individual basis. It is totally unclear how the introduction of exclusive "making available" rights in Bill C-60 will affect this whole process. On that last point, see D. Fewer, "Making Available: Existential Inquiries", in Michael Geist, ed., *"In the Public Interest: The Future of Canadian Copyright Law"* (Toronto: Irwin Law, 2005) c. 9.
- ⁴⁴ *Copyright Act*, *supra* note 8, para. 2.4(1)(b), considered in *SOCAN v. CAIP*, *supra* note 6, rev'g, aff'g Statement of royalties to be collected by SOCAN for the performance or communication by telecommunication, in Canada, of musical or dramatico-musical works — Tariff 22 [Phase I: Legal Issues] (1999), 1 C.P.R. (4th) 417.
- ⁴⁵ Bill C-60, *An Act to Amend the Copyright Act*, 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005, (First Reading, June 20, 2005) at s. 29 [Bill C-60].
- ⁴⁶ *Statement of Proposed Royalties To Be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works: Tariff 22*, Supplement to the Canada Gazette (May 14, 2005) at 16-19.
- ⁴⁷ Alison, *supra* note 3 at 66; Davidson, *supra* note 3. Professor Geist has suggested in the past that blanket licensing of peer-to-peer networks can be achieved through a levy added to student fees and high-speed Internet access, but it isn't clear whether the scheme would be voluntary or compulsory: Michael Geist, "Music Licensing Would Be Viable For All" *Toronto Star*, (8 March, 2004). More recently, Professor Geist has recognized the flaws inherent in Canada's existing levy scheme, which implies he would not support an expanded levy applied to Internet access: Michael Geist, "Copying Levy Hasn't Worked Well For Anyone" *Toronto Star* (8 August, 2004).
- ⁴⁸ Davidson, *ibid*.
- ⁴⁹ Netanel, *supra* note 3.
- ⁵⁰ Ku, *supra* note 3.
- ⁵¹ Fisher, *supra* note 3, c. 6.
- ⁵² Lawrence Lessig, *Free Culture* (New York: The Penguin Press, 2004) at 296-304, online: <http://www.free-culture.cc/freeculture.pdf>.
- ⁵³ Eckersley, *supra* note 3.
- ⁵⁴ Electronic Frontier Foundation, "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing" (2004), online: www EFF.org/share/collective_lic_wppdf.
- ⁵⁵ Electronic Frontier Foundation, "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing" (2004), online: www EFF.org/share/collective_lic_wppdf.
- ⁵⁶ David Kusek and Gerd Leonhard apparently propose a similar plan, although the details are vague. See David Kusek "Music Like Water" *Forbes* (31 January, 2005), online: http://www.forbes.com/columnists/free_forbes/2005/0131/042.html; David Kusek and Gerd Leonhard, *The Future of Music* (Boston: Berklee Press, 2005).
- ⁵⁷ Litman, *supra* note 3 at 42.
- ⁵⁸ Professor Fisher prefers a compulsory regime, but would be willing to accept a voluntary scheme, outside of governmental control. See *supra* note 3 at 46-52.
- ⁵⁹ "Maintaining the traditional legal pairing of property rights and contracts, which usually leads to market formation, seems like a safer course than mandates or new market intervention to correct for past market intervention." Merges, *supra* note 3.
- ⁶⁰ Liebowitz, *supra* note 3 at 19.
- ⁶¹ The recording industry might have earned \$12 billion if it had licensed rather than sued Napster and its users. Gervais, *supra* note 3.
- ⁶² David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000); and Sunny Handa, *Copyright Law in Canada* (Butterworths: Markham, 2002) at ch. 4. See generally J. Hughes "The Philosophy of Intellectual Property" (1988) 77 *Geo. L. J.* 287; E.C. Hettinger "Justifying Intellectual Property" (1989) 18 *Philosophy & Public Affairs* 31; W.J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory" (1989) 41 *Stan. L. Rev.* 1343; T.G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects" (1990) 13 *Harv. J. L. & Pub. Pol'y.* 817; W.J. Gordon, "On Owning Information: Intellectual Property and the Restitutory Impulse" (1992) 78 *Va. L. Rev.* 149; W.J. Gordon, "A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 *Yale L. J.* 1533; P. Drahos, *The Philosophy of Intellectual Property* (Aldershot: Dartmouth Publishing Company, 1996); and C. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002) 28 *Queen's L. J.* 1.
- ⁶³ The argument that these legal entities represent the work of vast numbers of people in their employ cannot hold water because the benefits of any rights claimed accrue not to employees but to corporate stockholders. The argument that legal entities claim entitlements on behalf of artists whose rights they obtain should also be viewed with scepticism.
- ⁶⁴ Christie, *supra* note 30 at 2.
- ⁶⁵ Transcript of Meeting on the Standing Committee on Canadian Heritage (22 October, 1996) online: http://www.parl.gc.ca/committees352/heri/evidence/26_96-10-22/heri26_bk101.html; and (7 November, 1996) online: http://www.parl.gc.ca/committees352/heri/evidence/37_96-11-07/heri37-cover-e.html.
- ⁶⁶ Gaita & Christie, *supra* note 14; and Christie, *supra* note 30.
- ⁶⁷ Gaita & Christie, *supra* note 14.
- ⁶⁸ See Liebowitz, *supra* note 3 at 19.
- ⁶⁹ Steven Shavell and Tanguy van Ypersele, for example, have provided a thorough analysis of how rewards other than intellectual property rights might be calculated. See "Rewards Versus Intellectual Property Rights" (2001) *XLIV J. L. & Econ.* 525 at 529.
- ⁷⁰ See Jeremy F. deBeer, "Copyrights, Federalism and the Constitutionality of Canada's Private Copying Levy", online: <http://www.ssrn.com>; Jeremy F. deBeer, "Constitutional Jurisdiction Over Paracopyright Laws" in Michael Geist, ed., *"In the Public Interest: The Future of Canadian Copyright Law"* (Toronto: Irwin Law, 2005), c. 4. Constitutional concerns have also been raised about legislative responses to private copying in the American context. See Lunney, *supra* note 3.
- ⁷¹ See, for example, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), 123 S.Ct. 769, considering Congress's power, under Article 1, Section 8 of the United States Constitution, to extend the term of copyright protection.
- ⁷² *Australian Tape Manufacturers Assn. Ltd. v. Australia* (1993), 176 C.L.R. 480, 112 A.L.R. 53 (Aus. H.C.).
- ⁷³ *CPCC v. CSMA*, *supra* note 4.
- ⁷⁴ See Jeremy F. deBeer, "Copyrights, Federalism and the Constitutionality of Canada's Private Copying Levy", *supra* note 70.
- ⁷⁵ *CPCC v. CSMA*, *supra* note 4 at paras. 46-47.
- ⁷⁶ Section 125 of the *Constitution Act, 1867* prohibits intergovernmental taxation in Canada, but the existence of the "fifth criterion" in the test for distinguishing taxes from regulatory charges in the case *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, does not turn on this section. The applications of principles of "federalism" to the private copying levy are important for division of powers issues, not the tax issues.
- ⁷⁷ Section 114 of the Australian Constitution prohibits intergovernmental taxation in Australia: *An Act to constitute the Commonwealth of Australia* [9th July 1900] (63 & 64 Victoria — Chapter 12). There may, however, be a relevant distinction between Canadian and Australian law in that pursuant to section 55 of the Australian Constitution, for which there is no Canadian equivalent, a tax law must deal only with taxation and cannot be a subset of another major legislative scheme. This suggests that mere "regulatory charges" may not exist in Australia.
- ⁷⁸ *Berne Convention Protection of Literary and Artistic Works 1886*, 828 U.N.T.S. 221 at Art. 9(2); *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994*, 1869 U.N.T.S. 299 at Art. 13. See Gervais, *supra* note 13 at 71-73.
- ⁷⁹ See *Digital Audio Home Recording Act*, 17 U.S.C. § 1001-10 (1992); and e.g., Tia Hall, "Music Piracy and the Audio Home Recording Act" (2002) *Duke L. & Tech. Rev.* 0023.
- ⁸⁰ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, at Art. 5(2)(b).
- ⁸¹ Mihály Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation* (Oxford: Oxford University Press, 2002) at 310-317, 340-342.
- ⁸² Eckersley, *supra* note 3; Fisher, *supra* note 3 at 44; Gervais, *supra* note 3 at 34-35.
- ⁸³ Eckersley, *supra* note 3 at 73.

- ⁸⁴ See *Status Report on Copyright Reform* submitted to the Standing Committee on Canadian Heritage by the Minister of Canadian Heritage and the Minister of Industry, online at: <http://strategies.ic.gc.ca/epic/internet/incrp-prd-nsf/en/rp01134e.html>.
- ⁸⁵ Rushton, *supra* note 28.
- ⁸⁶ Interim Report on Copyright Reform, Standing Committee on Copyright Reform, online: <http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/07-rap-e.htm>.
- ⁸⁷ *Supra* note 38.
- ⁸⁸ See Canadian Private Copying Collective, "Financial Highlights", online: <http://cpcc.ca/english/finHighlights.htm>.
- ⁸⁹ *Private Copying 2003-2004*, *supra* note 4 at 61.
- ⁹⁰ See *Copyright Act*, *supra* note 8, sections 83(13) and 84.
- ⁹¹ Mark A. Lemley and R. Anthony Reese, "Reducing Copyright Infringement Without Restricting Innovation" (2004) 56 *Stanford L. Rev.* 1345 at 1349.
- ⁹² *Ibid.*, citing Michael Landau, "Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users' and Content Providers' Rights" (2001) 49 *J. Copyr. Soc'y USA* 277, and Dan L. Burk, "Anti-Circumvention Misuse" (2003) 50 *UCLA L. Rev.* 1095.
- ⁹⁴ *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984) [Sony].
- ⁹⁴ *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984) [Sony].
- ⁹⁵ *CCH Canadian Limited v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [CCH v. LSUC].
- ⁹⁶ Grokster, *supra* note 93 at 19.
- ⁹⁷ *Ibid.*
- ⁹⁸ *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd*, [2005] FCA 1242.
- ⁹⁹ *CCH v. LSUC*, *supra* note 95 at para. 41.
- ¹⁰⁰ *Ibid.* at para. 38.
- ¹⁰¹ *Ibid.*
- ¹⁰² *CPCC v. CSMA*, *supra* note 4 at paras. 68–70; *Private Copying 1999-2000*, *supra* note 32 at 16. See also Fisher, *supra* note 3 at 4, 41.
- ¹⁰³ Gervais, *supra* note 3.
- ¹⁰⁴ See *Private Copying 1999-2000*, *supra* note 32 at 37–38; *Private Copying 2001-2002*, *supra* note 32 at 4–6; *Private Copying 2003-2004*, *supra* note 4 at 58–59.
- ¹⁰⁵ *Private Copying 1999-2000*, *supra* note 32 at 58.
- ¹⁰⁶ Canada's private copying regime was described as such by the Federal Court of Appeal in *AVS Technologies*, *supra* note 34 at para. 7.
- ¹⁰⁷ The data is insanely confusing, because there are different proportions to consider (including "consumer vs. business purchasers" and within that "music vs. non-music uses") and different statistics for different formats, not to mention conflicting evidence on the accuracy of different figures submitted by different parties. See *Private Copying 2003-2004*, *supra* note 4.
- ¹⁰⁸ See "Terms of Sale", online: <http://www.apple.com/ca/support/itunes/legal/policies.html>.
- ¹⁰⁹ *CPCC v. CSMA*, *supra* note 4 at paras. 118–126.
- ¹¹⁰ *Private Copying 2003-04*, *supra* note 4.
- ¹¹¹ See generally Jean-Marie Le Breton, *The Film Industry in Britain and France — Strategies for Success* (2000) Franco-British Council, online: <http://www.franco-britishcouncil.org.uk/filmindustry.htm>; and Grant & Wood, *ibid.* at 298–99 at sources cited therein.
- ¹¹² See Hugenoltz, *supra* note 3; and N. Helberger "It's not a right, silly! The private copying exception in practice" *INDICARE Monitor* (7 October, 2004).
- ¹¹³ See Ian R. Kerr, Alana Maurushat & Christian S. Tacit, "Technological Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 *Ottawa L.R.* 7 and the sources cited therein. Compare Barry Sookman, "TPMs: A Perfect Storm for Consumers: Replies to Professor Geist" (2005) 4:1 *C.J.L.T.* 23.
- ¹¹⁴ Gervais, *supra* note 3.
- ¹¹⁵ Note that the gradual phasing-out of levies contradicts the recommendation of Professor Hugenoltz. He suggests that levies should be eliminated as technological measures become available, regardless of the extent to which technological measures are in fact utilized. This would provide an added incentive for the music industry to create innovative business models built upon these technologies rather than relying on levy revenue as a source of income. See Hugenoltz, *supra* note 3.
- ¹¹⁶ *Private Copying 2003-2004*, *supra* note 4 at 62.
- ¹¹⁷ Bill C-60, *supra* note 45 at s. 27.
- ¹¹⁸ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, art. 5(2)(b).
- ¹¹⁹ See Melville Nimmer and David Nimmer, eds, *Nimmer on Copyright* (New York: Mathew Bender, 1997–) (loose leaf) at vol. 4 s. 13.05[F][5][a] pp. 13-265–13-271; Sony, *supra* note 94; *Recording Industry Association of America v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072 (9th Cir. 1999).
- ¹²⁰ Weatherall, *supra* note 3.
- ¹²¹ *Ibid.* at 11.
- ¹²² *CBS Songs Ltd v. Amstrad Consumer Electronics Plc*, [1988] AC 1013 at 1060.
- ¹²³ Australian Government, Attorney-General's Department, "Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age", Issues Paper, May 2005.
- ¹²⁴ *SOCAN v. CAIP*, *supra* note 5; *CCH v. LSUC*, *supra* note 95; and *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 S.C.R. 336.
- ¹²⁵ The Supreme Court held that reference to specific exemptions is unnecessary if an activity falls within the more general fair dealing provisions: see *CCH v. LSUC*, *supra*, note 95 at para. 49. The Copyright Board, in contrast, held that the section 80 exemption for private copying relegates the general fair dealing exemption to a second-order enquiry. At worst, therefore, if the section 80 exemption does not apply (because, for example, the medium is not an "audio recording medium"), the fair dealing provisions may be engaged.
- ¹²⁶ *Ibid.*
- ¹²⁷ See, for example, Mark N. Cooper, "Time for the Recording Industry to Face the Music: The Political, Social and Economic Benefits of Peer-to-Peer Communications Networks" (Stanford: Stanford Law School Center For Internet And Society, 2005); Owen Gibson, "Online file sharers 'buy more music'", *The Guardian* (27 July, 2005), online: <http://technology.guardian.co.uk/online/news/0,12597,1536888,00.html>; Michael Geist, "Piercing the peer to peer myths: An examination of the Canadian experience" (2005) 10:4 *First Monday*, online: http://firstmonday.org/issues/issue10_4/geist/index.html; Organisation for Economic Co-operation and Development, Working Party on the Information Economy, "Digital Broadband Content: Music" (Paris: O.E.C.D., 2005); Felix Oberholzer and Koleman Strumpf, "The Effect of File Sharing on Record Sales: An Empirical Analysis" (Harvard: Harvard University & University of North Carolina, 2004), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf; Tatsuo Tanaka, "Does file sharing reduce music CD sales? A case of Japan" (Tokyo: Institute of Innovation Research, Hitotsubashi University, 2004). But compare Liebowitz, *supra* note 3.
- ¹²⁸ *CCH v. LSUC*, *supra* note 95 at para. 69.
- ¹²⁹ *Ibid.* at para. 51.
- ¹³⁰ *Ibid.* at para. 53.
- ¹³¹ *CPCC v. CSMA*, *supra* note 4.
- ¹³² See Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A proposal for legislative reform" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005), c. 15.
- ¹³³ Grant & Wood, *supra* note 7 at 5.
- ¹³⁴ See Allan Gregg, "Art for Everyone: Stop funding elitist culture and support ventures that unite us" *Maclean's* 116:21 (26 May, 2003) 40; and Van der Ploeg, *supra* note 9.
- ¹³⁵ Grant & Wood, *supra* note 7 at 304–306.
- ¹³⁶ Grant & Wood, *supra* note 7 at 293.
- ¹³⁷ "In 2001-2002, cultural spending by all three levels of government in Atlantic Canada totalled \$446.2 million, 49 per cent of it from Ottawa. But study author Nicole Barrieau, a researcher with the Université de Moncton, said the industry generated \$2.1 billion in economic activity — 3.1 per cent of the region's GDP — and created more than 34,000

jobs.” See Stephen Bomais, “Culture industry gives more than it gets, study finds” *Daily News Halifax* (20 November, 2004) 21.

¹³⁸ See “Canada Music Fund Annual Report 2002-2003”, online: http://www.canadamusiccouncil.ca/en/about/pdf/Annual_Report_CMF.pdf.

¹³⁹ See “Financial Highlights”, Canadian Private Copying Collective, online: <http://cpcc.ca/english/finHighlights.htm>. By comparison, SOCAN had

an expense/revenue ratio at 20% in 2002. See Statement of Operations Chart, SOCAN, online: https://www.socan.ca/jsp/en/word_music/FinRep03.jsp#s1.